FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906

No. 107

Office Supreme Court,
FILED.
JAN 4 1907
JAMES H. McKENN

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

BRIEF OF THE DEFENDANTS J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON, NEE LAMB.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

BRIEF OF THE DEFENDANTS J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON, NEE LAMB.

STATEMENT OF THE CASE.

Plaintiff in his brief has so interwoven his inferences and conclusions with the facts, that it is deemed proper to state the facts as they came out at the trial.

This is a suit brought in the Circuit Court of the First Judicial Circuit, Island of Oahu, Territory of Hawaii, by Thos. Milner Harrison, plaintiff-in-error, originally against these defendants, J. Alfred Magoon, F. B. McStocker, Dorothea Lamb, subsequently Emerson, and L. C. Ables on two counts.

The claim in the first count is $10,000 damages for failure of the defendants to deliver to plaintiff stock of the market value of £2000 under memorandum of agreement hereinafter referred to as the Gilmore-Harrison agreement, attached to the complaint.

The second count was upon a foreign judgment for $10,600 damages, with interest, recovered in the Supreme Court of New Zealand, Northern District, for breach of that agreement against these defendants and Ables together with T. E. Cowart, J. H. Kirkpatrick and George D. Moore.

A demurrer to the complaint was filed (Tr. 7) on eight grounds, and sustained upon the ground of non-joinder of defendants, and plaintiff filed an amended complaint adding Cowart, Kirkpatrick, Powter, Wolfenden and Moore as parties defendant. In this amended complaint, he left out the second count on the foreign judgment, and relied only upon the first count under the agreement. Attention is called to the fact that though the New Zealand suit was against all the defendants in this case (Tr. 172) judgment was not rendered against Powter or Wolfenden.

The trial resulted in a non-suit in favor of these defendants and Ables (Tr. 207). Plaintiff then moved for a new trial and the motion was dismissed on the grounds: (1) that a motion for a new trial was improper in a case of decision and judgment of non-suit, and (2) that no notice of motion for new trial was given by plaintiff at the time of the decision and judgment of non-suit. (Tr. 208.) Plaintiff thereupon filed his bill of exceptions to our Supreme Court (Tr. 209) where these defendants and Ables moved to dismiss the exceptions on the following grounds:

1. That the aforesaid bill of exceptions of the plaintiff herein was not filed within the time allowed by law.

2. That no exception lies to the order herein dismissing plaintiff's motion for a new trial.

3. That no motion for a new trial lies after an order and judgment of non-suit.

4. That no notice of a motion for a new trial was given at the time that the order of non-suit was made in the above cause nor at any proper time. (Tr. 222.) Which motion was overruled (Tr. 223) and the bill of exceptions was heard and the exceptions were overruled (Tr. 231). Plaintiff then moved for a re-hearing and asked for leave to amend making Ables sole defendant. A re-hearing and leave to amend were both denied on the 6th day of March, 1905, after the law allowing appeals from the Territory to the United States Supreme Court was passed (Tr. 262) from which this writ of error is sued out.

The African Pacific and Indian Hagey Company, hereinafter referred to as the company, was a partnership formed in Honolulu, Territory of Hawaii, on the 10th day of April, 1897, between T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter, J. Alfred Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, (who afterwards married J. S. Emerson,) for the purpose of "administering the formulae known as the Hagey Gold Cure and the establishment and disposition of Institutes for the purpose of administering the formulae" in the Territory of the Islands of the Pacific and Indian Oceans and Continent of Africa, exclusive of the Hawaiian Islands, (Tr. 155). The formulae were supposed to be secret.

Cowart, Kirkpatrick and Ables immediately started for the field of operation. Cowart and Kirkpatrick being appointed the attorneys in fact of Magoon and Lamb (Tr. 168), Ables being appointed the attorney in fact of McStocker, (Tr. 168,) Magoon, McStocker and Emerson continuously remaining in Honolulu. The method of operation in the establishment of an institute was to secure quarters centrally located and fit them up suitably for administering the remedies (Tr. 41-104-5). The appointment included reading-room, office, perhaps a few bed-rooms for patients, bath-room, etc., all this could be done for comparatively a small sum. The fund for starting the Tasmania institute being not more than £200 (Tr. 107, 138.) It was necessary to have a physician to administer the drugs who had to be engaged. The remedy is similar to the Keeley Gold Cure (Tr. 125-6) and is claimed to be a proper scientific

treatment for inebriety, opium and tobacco habits. It is supposed to remove the desire for intoxicating liquor, opium and tobacco, but does not put the subject in such a condition that he is thereafter unable to return to their use. The expected profits were to be derived from the charge for the administering of the formulae and selling the right to administer it in certain designated territory. J. Wolfenden, a rival claiming to own the Thompson formulae, was taken into the company by agreement dated the 10th day of April, 1897, (Ex. H, Tr. 165), in order to get rid of his opposition, without the knowledge or consent of these defendants. Plaintiff together with A. E. Gilmore, without the knowledge of these defendants, were taken into the company as partners for the territory of Tasmania, under agreement dated September 20th, 1897; the plaintiff contributing a sheep ranch which he valued at £2000 and Gilmore paying in £250 in cash (Tr. 4-30).

Under this agreement the suit is brought. The agreement contained in paragraph 4, the following provision "if at or before the expiration of a period of six months from the date of the departure of said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said company will give the said Gilmore or the said Harrison, *stock of the market value* equal to the amount paid by him of the £2250 mentioned in clause 2 hereof in some other district of the company's field of operations in exchange for the portion of said £2250 taken by him. * * *" The damages claimed are for refusal to deliver this stock. A fund of not more than £200 (Tr. 107) was created for the starting of the business in Tasmania and placed in the hands of Harrison.

Harrison started from Auckland for Tasmania on the 4th or 5th day of October and went as far as Sydney (1200 miles) where he received the medicines and instructions which were forwarded to him as per agreement. After reading the instructions he became dissatisfied with the venture, returned to Auckland for the purpose of recovering the £2000 (Tr. 128-137).

Failing in this he consulted a lawyer, who advised him to go to Tasmania and enter upon the business of the partnership for the purpose of laying a foundation for establishing his claim in court. (Tr. 131-135.) On the 17th day of January or nearly three months after the signing of the Gilmore-Harrison agreement, Harrison again left for Tasmania where he arrived in February, 1898, (Tr. 135-6) and took steps, as he claims, to open up an institute. He obtained no patients (Tr. 142) and did no business except to pay out money and to draw his own salary, which was to be a first charge on the profits after the expenses were paid. At about the end of February, 1898, Harrison returned to Auckland for the purpose of enforcing his claim against the company, where he brought suit and recovered judgment. No service having been made upon these defendants nor upon Ables, plaintiff failing to collect his judgment, brought this suit in Hawaii.

STATEMENT OF GROUNDS OF DEFENSE.

1. That a motion for a new trial does not lie from an order of non-suit, hence plaintiff has no standing in this court.

2. That Harrison cannot recover, as he made no bona fide attempt to be satisfied with the condition of the partnership business in Tasmania, and when he became convinced that the formulae were a humbug and fraud he waived the right to rescind when he continued the prosecution of the business.

3. That Harrison violated his agreement with the company by depleting the sum provided for starting the business in Tasmania in drawing his salary from that fund. Having himself broken the agreement he cannot enforce it.

4. That the stock to be given in exchange was an interest in the company in some other place than Tasmania, and not corporation stock, bank of England stock, live stock or stock of merchandise; and as Harrison makes no claim for damage for refusal to give him such an interest, his suit must fail.

5. That in the Harrison agreement the phrase "market value" means "equivalent in interest." Otherwise the provision to give stock of the market value of £2000 would under

the circumstances be an agreement impossible of performance which Harrison well knew. Therefore plaintiff has sustained no damage, and his suit must fail.

6. That there was no consideration moving to the company for the agreement to pay the £2000. The consideration, whatever it was, went to Ables, and Harrison cannot recover against any of these defendants; nor can he recover against Ables in this action.

7. That there was a want of mutuality in the Harrison agreement in the provision obligating the company to pay the £2000 and plaintiff's action must fail.

8. That the partnership agreement of the company with plaintiff is not binding upon these defendants neither is it binding upon Ables for the reason that it was not executed by all the parties to be bound by it, and the suit must fail. This result follows whether the agreement be joint or joint and several.

9. That the following named acts were beyond the scope of the partnership business: (1) To acquire the Thompson formulae. (2) To take in J. Wolfenden as partner. (3) To create a new partnership with Gilmore and Harrison. (4) To sell the right to use the Thompson formulae. (5) To sell the Tasmania district and to take in payment therefor a sheep ranch. (6) In the selling of the Tasmania district to guarantee Harrison the payment of £2000 in case of his dissatisfaction within six months. (7) To agree to give stock in some other field; and to agree to give any stock of the value of £2000. That therefore the agreement with Harrison is not binding on these defendants neither can plaintiff recover against Ables in this action.

10. That the agreement with Harrison whereby a liability was created in express violation of the partnership agreement, with the knowledge of Harrison, is not binding upon these defendants.

11. That the powers of attorney from Magoon and Emerson to Cowart and Kirkpatrick and from McStocker to Ables did not authorize the attorneys in fact to bind their principal to any act not authorized by the partnership agreement.

12. That there was no ratification by these defendants of any unauthorized acts. And whether or not the acts relied upon establish ratification is a question of law.

13. That plaintiff gave no notice to these defendants of his dissatisfaction within the six months required by his partnership agreement.

14. Plaintiff is precluded by his own conduct from recovery in this action.

15. The agreement sued on was without consideration and void.

The Supreme Court has passed adversely to these defendants upon grounds 1, 4 and 5 and as defendants claim incorrectly.

DEFENSE I.

Our statutes clearly provide that bills of exceptions must be filed within 20 days after final judgment.

Laws of 1902, Act 32, section 17.

Otherwise it comes too late.

Kapiolani Estate v. Peck, 14 Haw. 576.

In this case the proceedings shown by the record are as follows:

Nov. 9, 1903. Non-suit granted.

Nov. 12, 1903. Judgment entered.

Nov. 14, 1903. Motion for new trial filed.

Dec. 31, 1903. Time to file bill of exceptions extended till 10 days after disposition of motion for new trial. This order was invalid as the 20 days time for filing bill of exceptions had already expired.

Jan. 16, 1904. Motion for new trial dismissed (not denied, see order dismissing motion).

Jan. 16, 1904. Time for filing bill of exceptions extended till 20 days after completion of transcript.

It will thus be seen that the bill of exceptions was not filed within 20 days after final judgment, nor was any order extending the time made within those 20 days. Unless, therefore, the filing of the motion for a new trial two days after judgment,

operated to suspend it or prevent it from being final, the bill of exceptions was clearly too late.

Kapiolani Estate v. Peck, 14 Haw. 576.

We contend (1) that the judgment was clearly final, (2) that assuming a motion for a new trial would ordinarily prevent it from being final, no new trial can be granted by the lower court after a non-suit, (3) no notice of a motion for a new trial was given when the order of non-suit was made and hence the judgment was final despite the motion.

In early times non-suits were all voluntary and hence were not appealable, but now judgments of non-suit are regarded as *final* and appealable, being in *invitum.*

2 Am. Dig. Appeal and Error, Sec. 471.

The Corning Tunnel Co. v. Pell et al., 4 Colo. 184.

Holter Lumber Co. v. Fireman's Fund Ins. Co., 45 Pac. 209.

Lalande et al. v. McDonald et al., 2 Idaho 287.

The appeal under our statutes must be taken within 20 days after final judgment. The only and final judgment in this cause was made and entered on Nov. 12th, 1903. We contend that the true test of whether it is final or not is whether or not it can be appealed from, and a judgment of non-suit is unquestionably appealable without a motion for a new trial, since it raises a pure question of law.

Burns v. Commencement Bay Land & Imp. Co., 30 Pac. 668.

Lashus v. Chamberlain, 24 Pac. 189.

Cravens v. Dewey, 13 Cal. 40, 42.

Darst v. Rush et al., 14 Cal. 82, 84.

Kleinschmidt et al. v. McAndrews et al., 117 U. S. 287.

Luirance and others v. Luirance, 32 Ind. 198.

The Montmorency Gravel Rd. Co. v. Rock, 41 Ind. 263; 14 Encyc. Pl. & Pr. 789 and notes.

John McKeague v. J. R. Helen, 3 Haw. 328.

Plankington, Asge., Resp. v. Gorman Imp. App., 93 Wis. 562.

But not only do we contend that a motion for a new trial is unnecessary to review a judgment of non-suit, but that it is improper to move for a new trial after such judgment.

See Kleinschmidt v. McAndrews, 5 Pac. 281, 288.

A motion for a non-suit is in effect a demurrer to the evidence and the effect of sustaining it has the effect of sustaining a demurrer to the pleadings. The court on entering judgment loses control of the case and cannot order a new trial of the facts merely because it has given an erroneous judgment as a matter of *law.* We therefore claim that a motion for a new trial, being improper in the case of a judgment of non-suit, cannot prevent that judgment from being final and appealable. It was therefore necessary to file the bill of exceptions in this case within 20 days from the date of the judgment.

The practise in the Circuit Court where a motion for a new trial is pending, has always been to get the extension of time provided for by the statute before the motion is passed upon, which is granted as a matter of right, especially where the 20 days would have elapsed before that time. And the necessity of this seems to be clearly borne out by one of plaintiff's own citations.

Ballou's Appeals and Exceptions, p. 16.

Section 1462 of the Civil Laws provides that "immediately upon the rendition of a verdict, or a judgment of the Court in Banco, or of a judgment at chambers, judgment shall be entered, unless notice is given at the time of the rendering of the verdict, or judgment, of a motion for a new trial." It is thus plain that the only provision for a motion for a new trial is upon the verdict of the jury or the judgment of the court.

It is limited to the rendition of a verdict, judgment of the court in banco, or to a judge at chambers. It will be observed that there is no provision for a motion for a new trial from any ruling of a judge during the progress of a jury trial, which would include, of course, the granting of a motion for non-suit.

There is nothing to compel a person to include in a bill of exceptions an exception to the refusal to grant a new trial.

Section 1438 of the Civil Laws provides for a bill of exceptions and it expressly provides for exceptions at the trial. To say that a party may have a bill of exceptions for errors occurring at the trial, which would include a non-suit, and then permit him to move for a new trial and to allege exceptions for refusal to grant the same would be allowing two exceptions for the same matter. There is nothing which would prevent a person taking out a bill of exceptions for errors occurring at the trial and have those passed upon by the Court, and taking out another bill of exceptions on the refusal of the Court to order a new trial on the ground that the verdict was contrary to the law and the evidence. It is evident that counsel for plaintiff construed the law just as defendants contended when in this case they procured an extension of time for filing a bill of exceptions before the motion for a new trial was disposed of.

Plaintiff will not now be heard to say that any ruling of the court upon the introduction of evidence was error. All the errors occurring during the progress of the trial could not affect the question, as nothing was submitted to the jury, and any such errors would not in any way prejudice plaintiff. No new trial can be granted for errors not prejudicial, nor is it easy to perceive how a judgment on motion for new trial is that errors of law occurred during the trial.

In Abbot's Law Dictionary, on page 605, the word "trial" is defined "more strictly the examination of the facts in issue."

A motion which does not ask for a decision on issue of facts arising on the pleadings, is not subject for new trial.

Harper v. Hildreth et al., 99 Cal. 265, S. C. 33 Pac. 1103.

Gregory et al v. Gregory et al., 102 Cal. 50, S. C. 36, Pac. 364.

In the Standard Dictionary of the English language, "new trial" is defined to be "a re-trial of an issue of facts, granted,

because of a defeat of justice at a former trial, as through inadvertence, misconduct or surprise."

"If the findings are correct and the Court has erred in the conclusions of law therefrom, the remedy is not by motion for a new trial on the ground that the findings are contrary to law, but by exception and appeal or motion to correct the conclusions of law."

14 Ency. Pleading & Prac. 789.

In note 4 on the page last cited we find the following statement: "An error of the trial court in rendering conclusions of law not supported by the findings is an error which can only be reviewed by appeal, as it is not a decision 'against law' for which a new trial should be granted." *Shanklin v. Hall,* 100 Cal. 26; Matter of Doyle, 73 Cal. 564, distinguishing *Simmons v. Hamilton,* 56 Cal. 495.

"If the conclusions of law are erroneous the remedy is by motion to correct them or by exception. A motion for a new trial on the ground that the decision is contrary to law is not the proper remedy, since the error would not be corrected by a new trial as to issues of fact, *Rose v. Duncan,* 43 Ind. 163."

Luka v. Poohina, 3 Haw. 728.
Notley v. Kukaiau, 11 Haw. 525.
71 N. W. 608.

While some authorities hold that a new trial may be granted by the Court after verdict, for errors which had been committed by the Court in the progress of the trial, there is no authority which has been called to our attention which permits a new trial upon anything short of a verdict. An order by a judge granting a new trial where he himself has prevented the trial, that is, a determination of the facts by the jury, is a solecism. A new trial must be on the facts and not on the law. If a judge committed errors of law, and the verdict was right notwithstanding the errors of law, there could be no new trial. For harmless errors, it is a well settled rule, a new trial cannot be granted.

If the facts are agreed upon there is no trial but merely an argument on the law.

A motion for a new trial is addressed to the sound discretion of the court. A motion for a new trial on the law cannot be entertained for the obvious reason that matters of law do not rest in discretion. They are positive, existing rules which require no evidence to establish them, and which no testimony can change.

In a jury waived case, if the court should grant a non-suit there could be no such thing as a motion for a new trial. What a court could do would be to vacate the non-suit, open up the case and hear testimony for the defense, but it would not try the whole case over again.

See case of *Hitchcock et al. v. Hustace,* 13 Haw. 641-652.

Non-suit is no bar to subsequent action.

Vivas v. Aswan, 11 Haw. 282.

The power to grant a new trial is solely to prevent injustice in matters over which the judge has no control. The jury is the judge of the facts, and its verdict, unless the trial court has a right to set it aside, would, however unfair, in a great majority of cases be final.

The refusal or granting a motion for a new trial is in this jurisdiction a proper ground for exceptions. It is the only way of taking the matter before the appellate court on the question of whether or not there is evidence to sustain it.

For the court to grant a new trial on questions of law is self-stultifying. It is based upon a request to pass in judgment upon his own proceedings. What assurance is there that it would be any more correct in its second judgment than in its first? If it might be certain that upon the hearing of the motion for a new trial in granting the non-suit that it was wrong, it would be another matter, but there can be no certainty that the second view of the law would be more correct than the first. The appellate court can only finally establish the law of the case.

The court should not have it in its power to cause such an injustice to the parties to a suit as to be able to discharge the jury and then grant a new trial because it thought, upon reflection, it had made a mistake. There are perhaps few long trials where the judge makes no mistakes, and mistakes which might appear vital to him upon reflection, but when the jury had been discharged these mistakes are beyond recall. If this were not so it would make no difference how long or how expensive the trial, the judge would have the right to dismiss the jury and then order a new trial; a tremendous power for oppression in the hands of an unfair, unjust, or even ignorant judge. The power might be so used that there might never be an end to a trial. A judge for some motive, good or bad, grants a non-suit, then grants a new trial.

Independently of the question of whether or not a new trial can be granted upon a non-suit, the right to grant a new trial is controlled by statute. It can only be granted in the case specifically authorized. See the California cases first cited.

"The proper and only practice is to apply to the court to take off the non-suit." 14 Cyc. 463 n.

"The decision on this question rests in sound discretion." Id. 460.

In a case tried before the court without a jury, there is no authority for a motion for a new trial on the merits and an order denying such a motion presents no question for review.

Resenquest et al. v. Canary et al., 50 N. Y. S. 111-112.

In this jurisdiction it was held prior to the decision on this motion that a new trial can only be granted on notice of a motion given at the time of the termination of the trial, which was not and could not have been done in this case.

Kekaua v. Kalei, 3 Haw. 683, and on a writ of error, p. 714.

DEFENSE II.

Harrison's agreement is dated September 20, 1897. He set out from Auckland for Tasmania October 4th or 5th (Tr. 126), arriving at Sydney, 1200 miles on his journey, he received the drugs and instructions from the company. Upon reading the instructions, he then and there became dissatisfied with his bargain (Tr. 104-128), knew he was deceived (Tr. 126), viewed it as a humbug and believed it would not be successful (Tr. 127-130). He did not want to be a party to the humbug (Tr. 128) and Robison had told him he had been taken in (Tr. 127). Harrison viewed the contract to treat patients under the Hagey formulae dishonest (Tr. 137). Harrison then returned to Auckland to get his sheep ranch back. To confirm his prejudice against the treatment, he tried it at Auckland on a cook, (Tr. 120), and it was a failure. Then he loitered until January 17th, almost three months from the date of his contract, before he made another start. He dates his real departure from Auckland from this latter date, claiming that the first start was futile as he did not reach his destination or as he puts it (Tr. 128): "Well, I did not consider that I really started for Tasmania until the 17th day of January, for the simple reason I intended to go to Tasmania. It ended in a false start and I came back before I got there." In other words he himself being 1200 miles on his journey, decided to make the start a false one and reasons that a false start is no start. This matter should be called to the attention of Mark Twain. Harrison's claim that he made a bona fide attempt to transact the business in Tasmania in view of this testimony does not agree with the experience of mankind. Harrison's testimony as to what he did to start a business which was valued at £5000, found in the transcript above referred to, plainly shows that his attempt was merely perfunctory with a view of laying a foundation for a suit in court, and had a verdict been rendered against defendants upon that ground it would be set aside and judgment *non obstante* rendered for defendants.

That Harrison admits that when he received at Sydney the instructions with reference to the Hagey treatment, he then and there believed the Hagey cure to be a humbug or fraud; and thereupon by continuing in the business, the object of which was to carry on the fraud, he waived his right to rescind the contract and to be dissatisfied, and cannot recover.

Pintard v. Martin, Smedes & M. Ch. 126 Miss.
Weeks v. Robie, 42 N. H. 316.
Lawrence v. Dale, 3 Johns. Ch. 23.
Knuckolls v. Lea, 29 Tenn. 577.
Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148.

Harrison has admitted that the treatment was a humbug. It is therefore impossible for him to have been satisfied with the condition of the business in Tasmania. A person cannot in law be satisfied with the prosecution of a fraudulent enterprise. If he starts out with the intention of humbugging the public he cannot, as a matter of law, be dissatisfied if he fail, because the law will not recognize such a dissatisfaction. It must be in good faith. Honesty is its pre-requisite. It is a contradiction of terms to say that he was honestly dissatisfied with his want of success in a dishonest transaction. Such a dissatisfaction leaves Harrison where it found him. The law cannot assist him to recover upon any such iniquitous claim.

Election to rescind must be prompt. After Harrison discovered the fraud he should have rescinded immediately.

24 A. & E. Cyc. of Law 1111.

And notice to rescind must reach the seller.

43 A. Digest Cc. 483, Sec. 319.

DEFENSE III.

A cursory view of Harrison's testimony referred to in Defense I will show that his attempt to start an institute at Hobart would of necessity be abortive. This may be in a measure accounted for because of his belief that the remedy was a hum-

bug and that it would be dishonest to administer it to a patient. The success of a business depends entirely upon the man at the head. No man unless he were crazy would ever consent for a minute to have his business conducted as was this Tasmania institute. But when we find Harrison appropriating to himself the funds provided for establishing the institute, is it any wonder the project failed? His salary was made a first charge upon the receipts and by implication, was not to be paid until there were receipts. The rule is that where there is a condition precedent to be performed by the plaintiff he cannot recover unless he shows that he has performed it or some good excuse for nonperformance. 9 Cyc. 699.

Now if Harrison had given away the entire fund placed in his hands so that he had nothing to start the Tasmania business with it would appear very clear that he would have no standing in court, in case he was obliged to give the business a fair trial before he could bring suit. If he took one dollar of the money without right he would be in just the same position. It might be impossible to prove that by the taking of £40, Harrison's salary for February, he prevented the success of the business, and so the law ought not and it is submitted does not call upon the defendants to prove that it did prevent the success. Harrison having admitted that he took £40 from that fund for his own private uses, and so put it out of his power to conscientiously perform the condition precedent, his suit should fail.

DEFENSE IV.

It seems plain that the stock to be given plaintiff under paragraph 4 of the Gilmore-Harrison agreement was an interest in the Hagey business in some other field than Tasmania; the use of the word "stock" being equivalent to interest. Hence it was not a covenant that there would be stock of the market value of £2000, but merely the right to exchange the interest which he received for an interest in some other locality. Any other construction would bind the company to have stock in some other field than Tasmania. It would be forced to incorporate and issue corporate stock. This the company would have no right

to do as it was limited by the partnership articles with which plaintiff was familiar, to the administering of the formulae and establishment and disposition of institutes for the purpose of administering the same (Tr. 156). There is no suggestion in the partnership agreement that the company should form corporations and issue stock. That there was not such a plan is evidenced by the silence of the partnership agreement. The general plan was to establish institutes or headquarters where the treatment should be given (Tr. 105), and then sell out. This was Harrison's understanding as shown by his letter proposing settlement dated March 10th, 1898, (Tr. 188), wherein he agrees to accept in settlement £1900 and £100 in stock knowing full well there could be no stock as such for the company to give him. As the company had no stock to give and no right to acquire stock it was impossible to give Harrison stock and the guaranty so to do was void for impossibility of performance. 9 Cyc. 326.

On page 121 Harrison says that Cowart and Kirkpatrick said to him: "We have an interest more than that value (£2000) in the new company formed to work in New South Wales. Q. They said what? A. They had stock of more than the value of £2000 in the new company they had formed to work in New South Wales and they would save 1-5 in that with £5000 cash. Q. You knew that didn't you? A. I was informed so by several people. Q. You inquired before you made your contract? A. Yes, sir. Q. And found that was true? A. They had saved a 1-5 interest in New South Wales."

The apparent object was to sell institutes carrying with them territory, not to run institutes with a view of making money out of them as a permanent business. The money was to be made in the sale of territory.

The stock or interest was to be given "in exchange." The idea conveyed by the word exchange is not a cash transaction such as it would be if the contention of Harrision is correct, for stock of a certain market value is the same as cash. What was the purpose of putting it in that way if it was intended to return Harrison the money in case he should be dissatisfied.

If it was to be stock and not an interest what difference should it make to plaintiff whether it should be in Tasmania or some other place for the most he could get out of it would be £2000. It might be most convenient for him to be given the stock while he was yet in Tasmania.

DEFENSE V.

Harrison had, without success, been for some months trying to sell his sheep ranch (Tr. 116). If his present contention is correct, he found a sure purchaser in the African Pacific and Indian Hagey Company on the most advantageous terms. He secured an opportunity of engaging in the Tasmania business, which promised large returns, at a fixed salary, and in case his expectations of profit should not be realized, he might at any time within six months demand his £2000. But this was not all, he might have carried on the business for several months at a great profit; and then it might have suddenly collapsed, giving him cause to become bona fide dissatisfied "with the condition of the partnership business in Tasmania." He then could have demanded back his money. It is not reasonable to claim that the company contemplated any such thing.

If then it was to be an interest in the Hagey Cure Enterprise there could of necessity be no market value to it. Such an interest could not have a market value any more than the interest of Tasmania, which Harrison bought. Who could say what the market value of an interest in the partnership should be? The value of an interest in a continuing partnership depends entirely upon the willingness of the other partners to take the purchaser of the selling partner into the firm. It is not possible that it could have a market value for the reason that a market value presupposes that there should be something on the market, not a mere intangible interest, the exact value of which could not be definitely known outside of the members of the partnership and where outside persons would have no way of investigating the facts, except by the courtesy of the other members of the firm. It was a covenant to do an impossible thing

and is controlled by the same authorities cited under Defense IV, viz.: 9 Cyc. 326.

Much of the success of a business ordinarily depends upon secrecy, and in this case it depended entirely upon secrecy as to the ingredients of the Hagey formulae (see last clause of company partnership agreement, Tr. 158). Harrison cannot contend that an interest in a partnership may have a value because the business may be wound up and the purchaser of an interest can then get his share for the reason that the whole plan was that it should be a going concern.

The Tasmania venture was to depend upon Harrison's efforts. It had no market value and could have none as no one could estimate what was to be the value of the personal services of plaintiff. In other words, Harrison paid £2000 for an interest in Tasmania, the value of which could not by any possibility be definitely known. Harrison now claims an impossibility, that is, if dissatisfied, he was to receive an interest which had an established value. The value (not the market value) would depend entirely upon confidential or partnership relations and consent of all the other co-partners. He cannot claim damages upon an agreement impossible of performance.

The company were not permitted to give stock in the same field as they would have been allowed to do had it been anything other than an interest in the Hagey business. For what difference could it make to Harrison whether or not the stock which he was to receive, if it were Bank of England stock, should be given him in some other place than Tasmania.

The £2000 was to be paid by stock, that is an interest in the Hagey Cure. If it had been the intent to pay in cash, in case there was no such stock, why was it not so stipulated? Harrison bought an interest in the territory of Tasmania not in shares of stock in a stock company or corporation. It was to be in exchange not a cash payment. The company could have no interest in making an exchange if Harrison could claim stock of the market value of £2000. For in that case they could turn their stock into cash as easily as Harrison could. The idea

of the word "exchange" shows plainly that they were to exchange an interest in one place for an interest in another.

Harrison desired to purchase an interest in the company's Tasmania field. He had no money, but did have a sheep ranch in the mountains; three or four days' journey from Auckland. The company, without knowng inuything of the country or the value of the sheep run, agreed to take the ranch at the valuation placed upon it by Harrison, practically a stranger to them, Harrison knowing that the company had no right to acquire such a business and bind the absent partners. The company not being in the sheep business shortly afterwards sold the ranch for £500. It had no use for the sheep run and had no power to acquire it, all of which Harrison was bound to know. The new company had placed a fund in Harrison's hand and started him for Tasmania, trusting as events proved the success of the enterprise wholly to him. No man of sense would have purchased the sheep ranch in any such manner. Yet this is just what Harrison claims the company did. Not only bound itself to purchase but to subject itself to a large outlay in the Tasmania venture in the hands of Harrison under a salary. It is doubtful if such a guaranty was ever heard of before. First a guaranty as to the efficacy of the formulae, second a guaranty as to the business ability of Harrison, third a guaranty of his honor that he would give the business a fair trial and honestly try to be satisfied, and fourth a guaranty that the business would be successful. It will be observed that it was not to be prosecuted for full six months but he had the right to be dissatisfied at any prior time.

It seems plain that the true intent of the words "market value" means nothing more than an interest in the company to the extent of £2000 in case of Harrison's dissatisfaction in Tasmania, and in which case he was to have the right to go to some other place and share in like proportion in the profits which his own efforts combined with his other partners should make. This right was never denied him. This is borne out by the testimony of Ables whom plaintiff called, who states that the £2000 mentioned was "simply a matter of putting in something, we should have put in £5000 just as well." (Tr. 82, 43.)

DEFENSE VI.

There was an entire failure of consideration. The agreement recited £2000. The proof shows a sheep run conveyed to Ables which he subsequently sold for £500 (Tr. 44-66). Not one dollar of consideration moved directly from Harrison to the company. That Ables subsequently chose to give the benefit of his unauthorized act to the company can give no right of action against it by Harrison. Whether he changed his mind about going into the sheep business or not, or whether or not he ever had any intention of going into the sheep business does not make any difference as to the legal obligations of the parties under the contract. Ables had it in his power to do what he chose with the sheep run. The company had no hold upon him. It is submitted that this court will not enforce the agreement against these defendants when they had no rights under the agreement against Ables. Harrison has himself alone to blame for this kind of contract. So far as these defendants are concerned, it must be considered in either one of two ways; first that Harrison is not telling the truth when he says that his sheep run was worth £2000, and deliberately imposed upon the company, or second, that Ables defrauded the company when he sold the sheep run for £500. These defendants should not be placed in the position of being obliged to follow up this transaction.

If the sheep run had been conveyed directly to the company, there can be little question, but what the signature of all the members of the company would have been necessary to the sale of it; for it was not a matter within the scope of the business of the company; and the personal signature of each member of the company would have been required for its disposition; their attorneys in fact under the powers could not have signed for them as it was beyond the scope of their powers. Thus these defendants would have been protected against any fraudulent disposition of the sheep run and would have been in a position to have turned back to Harrison at least their share of it in case of dissatisfaction.

DEFENSE VII.

Harrison bound himself to give nothing for the £2000. He bought an interest in the business for his sheep ranch. He paid nothing for the right to rescind the agreement and get back his £2000. The guarantee for payment of the £2000 was more in the nature of a penalty than anything else. As there was no mutuality, he cannot recover. Harrison bound himself to do nothing whatever.

In *Dorsy v. Patwood,* 12 How. 126, 136, 13 L. ed. 921, speaking of the contract, the court says:

"It is signed by both parties and is expressed in clear and precise terms but there is one characteristic necessary to give it validity. As a binding contract, it is clearly deficient. It wants mutuality. It imposes no obligation on Dorsy whatever. He is not bound either to render services or pay money as a consideration for one-half of the land."

In *Slee v. Bloom,* 19 Johns. 482, Spencer, C. J., says:

"On the other hand, if any of them have subscribed, under a general assurance from the appellant that he would take the stock off their hands, if they should require it, and they have gone on acting as stockholders, until the affairs of the company have become bad, and then require a fulfilment of the assurance, they can have no right, either in law or in equity, to an exoneration from contribution.

"It will be at once seen, that there would be no mutuality or reciprocity in such a bargain. If the concern was profitable then they would hold on upon their shares; if unprofitable or disastrous, then they would throw the loss upon the appellant. They would thus make him run the risk of all the losses, whilst they took the chance of all the profits."

See also 9 Cyc. 327-8.

DEFENSE VIII.

The amended complaint in this suit makes as parties defendant, Magoon, McStocker, Emerson, Ables, Cowart, Kirkpatrick, Powter, Wolfenden and Moore.

The complaint as originally filed had as parties defendants only Magoon, McStocker, Ables and Emerson, leaving out Cowart, Kirkpatrick, Powter, Wolfenden and Moore. The suit in the New Zealand court has the same parties defendant that are made defendants in the amended complaint in this suit (Tr. 3). The judgment, however, in the New Zealand suit was not rendered against all of the defendants, that is not against Wolfenden and Powter, so we have this anomolous condition. A judgment is recovered in the New Zealand court against Magoon, McStocker, Ables, Emerson, Cowart, Kirkpatrick and Moore, leaving out Wolfenden and Powter, and in this suit the plaintiff is trying to recover judgment against all of the defendants named in the amended complaint, including Wolfenden and Powter on the very same cause of action.

It appears affirmatively that Moore did not sign the Gilmore-Harrison agreement and no showing is made that Powter's name was signed by any one with power so to do. It appears affirmatively that the names of Magoon and McStocker were signed to the agreement without authority. There is no showing that Moore and Powter ratified the agreement and an affirmative showing that Magoon and McStocker and Lamb did not ratify it. Under these circumstances, plaintiff can in no event recover against any of the defendants, and this is true whether the Gilmore-Harrison agreement is joint or joint and several. The Supreme Court (13 Haw. 360) held that the agreement was joint and several. This was merely *obiter dicta* and it overruled itself in its last decision on plaintiff's bill of exceptions. The expression in the agreement "for themselves individually and the said company collectively" has no reference to the payment of a penalty of £2000 but only to the creation of the partnership. It will be remembered that Harrison

and Gilmore were uniting with the partnership already formed, the old partnership collectively assuming a new partnership relation and at the same time each of the old partners associating himself individually with each of the new partners. This is all that the phrase "for themselves individually and the said company collectively" could possibly mean.

When we consider the provision of the guaranty or penalty, we plainly see that the *several* feature is no longer present for the penalty is not to be paid in cash, but in stock of the market value of £2000 in some other district of the company's field of operation. We have shown that this meant an equivalent interest in the business. The obligation to give stock was a partnership obligation and not a several one. There was nothing in the nature of things why there should be an individual liability apart from the joint liability.

If then the agreement was joint and unauthorized as to any there can be no recovery upon it as recovery must be against all jointly or none. 9 Cyc. 755.

Whether the agreement is joint and several or joint is not so important, for plaintiff has elected to make all the partners jointly liable. He must recover against all or none. On joint and several obligations each party may be sued separately or all jointly. Any number more than one and less than the whole cannot be sued. 9 Cyc. 657.

The consequences of joint liability make the question of ratification unimportant. Plaintiff claims to have proved that Wolfenden was a partner, and though his name is not in the body of the Gilmore-Harrison agreement, he bound himself by signing it just as the others did (9 Cyc. 301). The law is as stated by the Supreme Court in this case, that until a written agreement prepared to be signed by several has been signed by all it is not binding on any. (7 Am. & Eng. E. L. 111.) All the authorities relied upon by plaintiff in denial of this rule are on uniliteral instruments, such as bonds and for obvious reasons don't apply.

DEFENSE IX.

The company was a non-trading partnership and the doctrine of general agency does not apply, and there is no presumption of authority to support the acts of the partners executing the contract with Gilmore and Harrison. (See *John Harris v. Mayor,* Baltimore, 8 L. R. A. 677.) In this case the court quote with approval the following:

"It is laid down as the settled law that one partner in a non-trading partnership cannot bind his co-partner by a bill or note or note drawn, accepted or indorsed by him in the firm name, even though it be for a debt of the firm, unless either he has express authority therefor from his co-partner or giving of such instrument is necessary for the carrying on of the partnership business or is usual in similar partnerships; and the burden is upon the party sueing on such note or bill to prove such authority, necessity or usage."

Plaintiff contends that the agreement is joint and several. This these defendants dispute (see Defense VIII), but if it were joint and several, one partner would clearly have no right to make it on behalf of the firm.

The purchasing of the right to use the Thompson formulae was wholly foreign to the objects of the partnership. There was no limit to the damage that might have been caused by administering it, and the sale of the right to use it was inherently vicious.

The same objection applies to the taking in of Wolfenden as to taking in Gilmore and Harrison.

The sale by one partner of his interest terminates the partnership; the purchaser has no right to bind the remaining partners. In this case we might have been associated with the biggest scoundrels on earth who, as partners, could in 24 hours ruin each one of these defendants by transactions fairly within the scope of the partnership business with persons who had no knowledge of the restrictions in the partnership agreement as to the creating of liability, or for torts where there was no restriction.

Nothing can be easily conceived as being more foreign to the business of the partnership than to buy a sheep ranch. It might just as well had been a gold mine, railroad or steamship line. If the partners had the right to buy a sheep ranch and go into the sheep business, they had a right to do anything. No authority can be found, it is believed, to justify this conduct on the part of the partners.

While it may be conceded that a partner might have the power to bind his co-partner to a sale on approval where such was the custom or where the particular business required such sales, it is contended that such a power is most pernicious and should be very strictly guarded. Such sales open the door wide for fraud. When the goods are in the store they are supposed to be safe and protected by insurance; when they are withdrawn they may go into irresponsible keeping and become liable to be lost, stolen or destroyed with no protection to the non-consenting co-partner. In this case no custom or necessity was shown for this most extraordinary sale. It was inherently vicious and not within the power of a partner to make without the consent of his co-partners.

It would be bad enough if in the sale of the territory for £2000 in which it is claimed the guaranty was made that the £2000 should have been in cash so that the partners could have been benefited by it to the full extent of the value placed upon the sheep; but to give the guaranty for a sheep run, which was subsequently sold for £500, thereby causing a loss to the partnership of £1500 and then claim that the nonconsenting partners were bound by the agreement is to us nothing less than monstrous.

The giving of the guaranty shocks one's sense of square business dealing. It might just as well have been for £10,000 or a much greater sum. It might have been for the entire unsold territory of the company. It might have been for the expenses of Harrison to Africa at a salary of £2000 a year. Fancy has no limitations and imagination no bounds as to what evil could not follow the sanction by the court of the right to give the guaranty contended for.

To agree to give stock in some other field, was clearly without the power of the partner or agent. In the first place as has been pointed out, the company had no stock and no right to acquire stock; but if it had stock, it should be permitted to give stock to Harrison upon demand whether in Tasmania or any other place. It ought not to be forced to go to some other district of its field of operation to give Harrison the stock. This provision is so unusual and exceptional that strong proof ought to be given of some necessity usage or custom to justify it. There being no such proof, Harrison should not be permitted to claim that the company is bound by any such provision.

DEFENSE X.

It is well settled that a partner may limit his liability to those with knowledge of the inhibition in the partnership agreement.

"Whatever, as between the partners themselves may be the limitations set to each other's authority, every person not acquainted with those limitations is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, as ordinarily carried on by other people. But no person is entitled to assume that any person has a more extensive authority than that above described. The consequences of this principle are:

"That if an act is done by one partner on behalf of the firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners. * * * In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority." (1 Lind on Part., pp. 236-7-8.)

"The act of one partner to bind the firm must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners, nor it seems will necessity itself be sufficient; if it be of extraordinary necessity.

What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test, and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin." (1 Lind on Part., 239.)

The members of a partnership may, by their agreement, restrict the authority of one or more of them to bind the firm and any act done in contravention thereof with notice is not binding on the firm. 22 Am. & E. Ency. of L., 142.

"When the articles of co-partnership expressly deny the right of each partner, without the consent of the other to bind the firm for borrowed money, a contract in violation of such agreement, would not be valid though it was made in furtherance of the interests of the firm."

King v. Levy et al., 13 So. 282.

If there was any one thing that was intended to be made clear by the agreement it was that the partners should have no right to create liability.

In the first place there was to be no liability for the salary of the officers. In the second place it is expressly stated that none of the partners will give or endorse any note or create any liability on behalf of the company. In the third place a fund of $2625.00, being 2½% on $105,000.00, was levied on the partners as will be seen by the amounts returned to Magoon, namely, £61 on $12,500.00 invested; to Lamb £12-1-6 on $2500.00 invested (Ex. K, Tr. 168-9); to McStocker £24-7-5 on $5000.00 invested (Ex. E, Tr. 162-3). This fund was supposed to be sufficient for the successful launching of the business and no partner was to be liable for losses other than from this fund.

How human ingenuity can read into this contract an intention to authorize the creation of partnership liability without

limit with those who had notice of the agreement, it is impossible to see.

The only escape for plaintiff is to contend that the guaranty for payment of £2000 is not a liability, but this he cannot do as he speaks of it in his brief (page 5) as a liability as well as in his testimony (Tr. 121-2).

The business of the company was the administering of the formulae known as the Hagey Gold Cure and the establishment and disposition of institutes; for the purpose of administering said formulae, a fund necessary for the establishment and maintenance of the institutes was placed in the hands of Cowart, Kirkpatrick and Ables.

On page 19 in plaintiff's brief, it is stated that "The right of the partners to incur liability in connection with the fund is not only apparent on the principle, *expressio unius est exclusio alterius,* but especially is expected from the clause that forbids the creation of liability, while the losses were to be borne in accordance with the proportional share, which each may hold and the managing partners were to render accounts once a month or oftener if necessary of all * * * the losses by them or any of them sustained." In other words it is argued that inasmuch as the partnership agreement provided for the sharing of losses it nullifies the prohibition against the creation of liability. Is it not unfair to claim that an express prohibition is to be annulled by inference; that a plain expression of intention is to be set aside by a statement which can in no event be more than equivocal? The sharing of losses like the sharing of profits is a matter personal to the partners. It does not affect other persons. No one not a partner can share the losses or profits of the business. So what does it matter to outside persons that partners have agreed to share the profits and losses in a certain proportion. The statement "sharing the profits and losses," is only for the purpose of ascertaining the pro rata share of each partner in the profits and losses. But it is said that inasmuch as a provision for losses is contained in the agreement it must of necessity follow that a partner may create liability. That this is not true is easily proved. For instance an agreement of partnership

which contains no provision as to the sharing of losses states that one partner shall not give a note on behalf of the company without the consent of the others. One partner gives a firm note for $100 without such consent to the person who has full knowledge of the agreement. The other partner denies liability. According to plaintiff's contention, he would be bound on the theory that the law itself says that partners shall share the losses. Though not a word is contained in the agreement about sharing losses, the law writes the word losses into the agreement and we cannot get away from it any more than from the air we breathe.

Again plaintiff fails to distinguish between contractual losses and those that arise from acts of omission or accident. As to the former, partners may limit their liability, as to the latter, they cannot; instances of the latter would be losses from fire, bad debts, mal administration of the Hagey formula through which persons should be injured. To take the money of the company to pay the running expenses of the business is a very different thing from making a guarantee with a person who knows that by the partnership agreement, a partner is expressly prohibited from giving such guaranty. In the eye of the law all expenses are losses, and are carried to the debit of loss and gain account when the books are closed. Losses that arise from torts cannot be controlled. It would be against public policy for a partner to be permitted to protect himself against damages arising from torts committed in the prosecution of the business. It is therefore perfectly apparent that the provision for sharing losses has no possible relation to the limitation upon individual partners with reference to contractual liability.

The very purpose of creating the fund was to obviate the necessity of creating any partnership obligation. To contend that no debts could be contracted for the establishment and prosecution of the business, which might be necessary in case the fund had proved insufficient and which might have been small in amount, and in the same breath to contend that a partner honest or dishonest could, with or without collusion, create a

liability which might ruin all his co-partners is most inconsistent.

The language of the agreement prohibiting the creation of liabilities is plain: "where, however, there is no imperfection or ambiguity in the language of a contract, and it contains no technical terms of art, science or trade, it will be considered as containing the entire and exact meaning of the parties." 9 Cyc. 773.

It might be contended with greater force that Gilmore or any other of the Tasmania partners would have the right to bind that company to a liability similar to that involved in this case for there is no prohibition against creating liability in the Harrison-Gilmore agreement. In that event doubtless, plaintiff would change his views as to the powers of partners and agents to create liability on behalf of co-partners and principal.

In fact we hear Harrison (Tr. 146) making the same complaint, that his partner, Robison, created an unauthorized liability in the matter of the sheep run.

DEFENSE XI.

The powers of attorney (Exhibit B, Tr. 158 and Exhibit J, Tr. 168) especially restrict the acts to be done to matters authorized by the company's partnership agreement.

It seems to be contended that the powers of attorney should be construed to authorize acts expressly prohibited by the partnership agreement for the reason that the giving of such powers was otherwise useless. In other words, that no good reason can be found for the giving of the powers unless it was to enlarge the powers of the partners to whom they were given.

This argument has no force for it makes no difference what the intention of the parties was so long as that intention was not expressed in the power. In the first place these powers of attorney must be construed precisely as though they had been given to third persons or not to members of the partnership. In such a case it would be such a simple proposition that there would appear hardly room for argument, that the attorney in fact would not be authorized to do any act prohibited by the partner-

ship agreement or beyond its scope. A clearer case even would be if all the partners had executed a power of attorney like those in this case; no one would contend that it gave the extraordinary powers contended for. But the assumption that the powers of attorney were unnecessary unless to enlarge the powers of the partners is wholly without foundation. The last clause of the partnership articles provides: "That no partner shall under any circumstances whatever reveal the ingredients of the said formulae before he administered them, and any person purchasing the right would necessarily want to have knowledge of the formulae. In this connection it is worthy of note that the contents of the formulae could be made known to third persons with the consent in writing of all the other partners first obtained; but there was an absolute inhibition to the incurring of liability.

Then again it was proper to have some one to receipt for the dividends, if any there might be, of the absent partners; and it was proper, if not absolutely necessary, to have some one on the spot to sign the names of the absent partners to the disposition of any real estate the company might acquire.

A case very nearly in point is *Horne v. Ingraham,* (Ill.) 16 N. E., where G. S. Ingraham gave to his partner, William S. Ingraham, a power of attorney at the same time as the creation of the partnership with power to sign his name to any instrument in any and all business pertaining to the real estate business or otherwise that he might desire to do and to perform every act and thing whatsoever requisite and necessary to be done in and about the premises. The court say: "The general expressions in the power of attorney should be limited to the clear and obvious intent and object of the agency. The language in the power was used in connection with the subject matter of the partnership agreement, and will be presumed to have related to that matter, and will be construed and limited accordingly. * * * By the terms of the instrument which Horne induced William to sign * * * the partnership * * * was materially changed. * * * Granvelle's interest of one-half * * * was reduced to one-third. A new partner was admitted into the firm in the person of Horne * * *

These extraordinary provisions * * * do not come legitimately within the language used in the power of attorney."

An agent has no right to bind his principal to a warranty without express authorization or proof of usage.

Pickert v. Marston et al., 32 N. W. 550.
Bierman v. City Mills, 30 N. Y. Supp. 929.
Wait v. Borne, 123 N. Y. 592-604; 25 N. E. 1053.
Argersinger v. McNaughton, 114 N. Y. 535-538; 21 N. E. 1022.
Smith v. Tracy, 36 N. Y. 79, 81.
Herring v. Skaggs, 62 Ala. 180; 34 Am. Rep. 4.
Herring v. Skaggs, 73 Ala. 446.
Upton v. Suffolk County Mills, 65 Mass. (11 Cush.) 586; 59 Am. Dec. 163.

Proof of the usage authorizing the giving of such warranty must be made by the party claiming the breach of it.

There is an utter failure of proof by the plaintiff of user, custom or necessity for the guaranty to give plaintiff stock of the market value of £2000.

Herring v. Skaggs, 62 Ala. 180.

In *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, the court say: "The authority to act for another is a legal question for the court to decide if only one inference can be drawn from the evidence and that is want of authority."

The existence of an agent's authority is purely a question of fact; what he may do by virtue of it is a question of law.

Glen v. Savage, 13 Pac. 442.

DEFENSE XII.

Harrison relies upon ratification (Tr. 110). This must be discussed under two heads: (1) Knowledge of all the material facts, (2) Retention of benefits.

Under the first head Harrison charges defendants with *implied knowledge*. He charges these defendants with notice, not on what he (Harrison) did in communicating with

them but on what he failed to do, in consequence of which these defendants failed to communicate with him. Although they never heard from him nor from any other living person that there was such a man as Thomas Milner Harrison until they received a copy of the summons in his New Zealand suit about July 23, 1898, and never had any reason to believe that there was such a man, Harrison knowing all of the time, full well, of the whereabouts of these defendants, now complains because they did not write him to ascertain the particulars of his agreement with the company. If he had apprised these defendants or any of them of the particulars of his agreement he would be in a different position, but we fail to see how Harrison can successfully claim ratification predicated upon the fact that he failed to do his duty to us.

Harrison charges these defendants with implied knowledge in that they failed to make enquiries of their co-partners as to the particulars of the Gilmore-Harrison agreement with the company as soon as they received the information contained in memorandum enclosed in letter of Ables to McStocker (Ex. D, Tr. 161) dated Oct. 2, 1897, and in letter of Cowart to Magoon (Ex. I, Tr. 170) dated Oct. 7, 1897. These letters contained information to the effect that they had sold a one-half interest in Tasmania for 8000 sheep and leasehold valued at £2000, but of uncertain value and £250 cash.

We fail to follow plaintiff's reasoning when he claims that because Moore came to Honolulu, it necessarily follows that he told these defendants all the material facts with reference to the agreement with plaintiff. In the first place Moore did not sign the Harrison agreement. He refused to sign. (Cowart's letter, Ex. I, Tr. 170.) And he must be presumed not to know its contents. In the next place he knew very little about the details of the business (Tr. 39), and last Mrs. Emerson testified that she did not recollect that Col. Moore said anything about the Tasmania contract (Tr. 86). Ables testified to the same effect (Tr. 53-4); even Ables did not remember saying anything about the Harrison agreement to these defendants after his return to Honolulu (Tr. 56).

Plaintiff further claims that these defendants acquired full information of the condition of the business from the trial balance signed by Ables. This contention, of course, is wholly without merit for any novice in bookkeeping knows that a trial balance shows nothing about the details of the business. It merely shows the number of accounts and the amount to the debit and credit of each account, and is taken solely for the purpose of verifying the accuracy of the books. This is forcibly illustrated by the examination of plaintiff's counsel of Ables, the bookkeeper, as to the meaning of the different items appearing in the trial balance. (Tr. 51.)

It is indeed difficult to see how plaintiff can attempt to lead the court to the belief that these defendants before the agreement with plaintiff, knew of the material facts of any transaction entered into by the partners in Australia. The citations from the transcript in plaintiff's brief conclusively show just the opposite. They never knew the material facts of any transaction other than that they received on about the 23rd day of July, 1898, a copy of the New Zealand summons in the suit brought by Harrison, to which was attached a copy of the Gilmore-Harrison agreement. Then was the first time that they knew definitely of the contract with Harrison. In this connection the attention of the court is especially called to the letter of Magoon to Cowart and Kirkpatrick dated Sept. 23, 1897, (Ex. 7, Tr. 100) written in Honolulu three days after the agreement was signed and the letter dated September 16, 1897, (Ex. 9, Tr. 204). Also to the letter to Dexter dated Sept. 23, 1897, (Ex. 6, Tr. 199) and the letter to him dated Dec. 16, 1897, (Ex. 8, Tr. 201).

In *Hull v. Young*, 3 L. R. A. 521, the question was whether Young ratified the giving of the note and the court say:

"Now whether it was ratified is a question of fact, but what constitutes ratification may be and was made below in this case by the requests to charge a question of law. The judge was called upon to say whether a certain state of facts would in law amount to a ratification.

"Now what is ratification? Ratification is the affirmance and approval of an act giving sanction and validity to something done by another. Can this be done without the party charged with such approval knowing the nature of the act approved?

"In the case below * * * the judge was called upon to instruct the jury that it (the giving of the note) could have been ratified by Young without his knowing the note was a sealed note. In other words that the act might be ratified without Young knowing what the act was. We do not see how this could be possible, * * * and when he was requested to charge in substance that Young might ratify his partner's sealed note without knowing that it was a sealed note, we do not see how he could have done otherwise than he did."

The partners making the Gilmore-Harrison agreement were in New Zealand, and these defendants had no opportunity to repudiate it before final consummation. See

Swayne v. Union Mill, &c., 49 S. W. 518.
Williams v. Stonne, 46 Tenn. 203.
Amory v. Hamilton, 17 Mass. 103-109.

"The fact that a wife, under a mistaken belief that a note and mortgage executed by her husband, as her agent, for money borrowed by him, was binding on her, acquiesced in the payment of installments of interest on the note, does not constitute a ratification of his act."

Brown v Rouse, 104 Cal. 672, 675-6, 38 Pac. 507.

"A paper, authorizing an agent to sell any goods he might bring in the store and with the goods of the principal, and draw out the avails of such goods, is not authority for purchasing on the principal's credit, and it is not a ratification of such purchase that in compliance with the terms of the paper, some of the avails went to the principal's credit without his knowledge or consent."

"To show a ratification by a principal of the unauthorized contract of an agent by the acceptance of its benefits, it must

appear that the principal had knowledge of the material facts, or that he intentionally accepted the benefits without inquiry."

Jewell Nursery Co. v. State, 59 N. W. 1025.

"To establish ratification, knowledge of all the facts, before receiving the fruits of the sale, must be shown."

Thompson v. Craig, 16 Abb. Prac. 29.

"The receipt by the principal, of the proceeds of the sale of a horse, sold by an agent, is not a ratification of the agent's warranty of soundness, unless, at the time of receiving the money, he knew that the warranty had been given."

Croom v. Swan, 1 Fla. 211-216-7.

"That a firm used money borrowed by a person not a member does not amount to a ratification by the firm if it had no knowledge of the fact that money had been borrowed."

Eggleston v. Mason, 51 N. W. 1.

"A ratification by the principal will not be presumed from his acceptance of the profits of an agent's services unless he has knowledge of the sources and circumstances thereof."

Howe Mach. Co. v. Ashley, 60 Ala. 496.

"No necessity to make inquiry as to a completed transaction."

Combs v. Scott et al., 12 Allen p. 497.

(2) The retention of benefits.

Town's Adm. v. Hendee, 27 Vt. 258-263.

"The mere receipt by the principal, of the proceeds of the sale of his own property in ignorance of an unauthorized warranty by an agent, is not ratification of it."

Smith v. Tracey Executor, 36 N. Y. 79.

"If money due a principal from his agent is obtained by such agent by the unauthorized use of the principal's name, and paid

over to the principal who received it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he keeps the money after being informed of how the agent obtained it, is not a ratification."

Case v. Hammond Packing Co., 79 S. W. 732, and many cases therein cited.

There is not a particle of proof that these defendants received Harrison's money. The proof is just the reverse, although Harrison's money. The proof is just the reverse, Ables says the dividend was declared Oct. 29th, (Ex. E, Tr. 163), and this is borne out by Cowart. On Oct. 7, Cowart writes (Ex. 1, Tr. 170): "I know we will take a lot of cash before next mail," and on the 30th he writes (Ex. K, Tr. 169) of remitting Lamb and Magoon 18% and speaks of closing a deal the day before, out of which they received £5000. Now on Oct. 31 or two days after the dividend was declared, there was cash on hand £94-7-8 trial balance (Ex. 4, Tr. 194). This together with £110, which was the company's share of the fund to start the Tasmania business (Ex. 1, Tr. 168), makes £204-7-8. This they had on hand and in the hands of Harrison when the dividend was declared. There is no evidence as to what amount was paid out after the dividend was declared and before the trial balance was taken on Oct. 31, 1897, and so far as we know, more might have been paid out than the entire amount received from Harrison and Gilmore, namely from Harrison £50 on account of the note given by Robison; and from Gilmore £250, making £300. In fact Ables certifies (Tr. 71) that the dividend of £3780 was paid out of the £5000.

Then so far as Harrison was concerned we find that £50 had been received on account of the sale of the sheep and the company had on hand and in Harrison's hands £204-7-8. But if it is claimed that it had received £300 on account of the Tasmania deal, it must be remembered that £250 had come from Gilmore and as the guarantee to pay ran to them individually, the contract might have been ratified by these defendants as to Gilmore and repudiated as to Harrison. Harrison had no right

to claim ratification by these defendants because they might have received and not returned some of Gilmore's money.

In *Baldwin et al. v. Bumons et al.,* 47 N. Y. 199, on page 213, Repallo, J., says:

"The mere fact that the proceeds of the contract made by one person in the name of another or a portion of them have come to the hands of the latter is not of itself sufficient to render him liable on the contract. To have that effect the proceeds must be received not only with knowledge but under such circumstances as to constitute a voluntary adoption of the contract. * * * Clearly if defendants received part of the proceeds innocently as the money of Blanchard their subsequent omission to return what they had received could not make them liable upon the original contract."

A leading case on the question of notice and ratification is that of *Thompson v. Murphy et al.,* 53 S. E. (W. Va.) 908:

"The rule, that notice to the agents of facts arising from and growing out of the subject matter of this agency, is constructive notice to his principal, has no application to the case where the question is, whether the act relied on to bind the principal was done within the limit and scope of the agent's authority. * * * A principal is not bound by the acts of his agent beyond the extent of his authority except by ratification after full knowledge of the material facts. This rule of itself negatives the view that the knowledge of the agent is notice to the principal. If it were, proof of such knowledge would be unnecessary. As to such acts there is no relation of principal and agent. The acts are not within the agency. * * * There can be no ratification by *acquiescense* unless the principal has full and complete knowledge of all the material facts attending the unauthorized acts."

"Knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized acts of his agent."

Fitzgerald v. Kimball Bros. Co., 107 N. W. 227.

"An employee bought and sold cotton through a broker in the name of his employer who on hearing what had been done said

it ought not to have been done without consulting him. The employee informed the employer that his act was an error of judgment, and that if he could from his salary make the loss good, he would do so, to which the employer made no response. Held not to show ratification."

Norden v. Duke, 99 N. Y. Supp. 30.

In *Slee v. Bloom,* 19 Johnson 482, the court say:

"Silence unless when a person is bound to speak and when silence would mislead can never have the affect attributed to the appellant's conduct."

But in case these defendants had received some of Harrison's money in the dividend that was paid them and though they had received it with full knowledge of the fact of the Harrison agreement, they would still not be bound. How would it be possible for them to determine what portion of the dividend that they received should be returned to Harrison. Could they be called upon to return the whole £2000? This, of course, would be absurd. Should they return the £500? Harrison would not have thought of accepting that and it would be a vain thing for them to be called upon to do it. Should they have tried to figure out what proportion of the Harrison money they had received? This would be, if not impossible, at least impracticable. They would have to take the risk of settling up the partnership affairs and ascertaining exactly what amount was to be returned to Harrison of what they had received. This they never had any means of ascertaining, for after Ables left New Zealand no accounts of the receipts and disbursements were given to defendants nor to Ables. It then appears that if by any possibility any of the consideration derived from the Harrison sale came to these defendants, it was so inextricably mixed with the money of these defendants that it would be impossible to ascertain what, if anything, they should return to him; and because they deemed it impossible, the law will not impose upon these defendants the duty of ascertaining what amount they should repay to Harrison of the amount that they

might have received from him, which, under the most favorable circumstances, would be but trivial, at the risk if they failed in their exact duty to make them liable to the payment of £2000.

Harrison was not in any way induced to do anything to prejudice himself by anything these defendants did.

Acts that amount to acquiescence must be such as to prejudice a party who claims the benefit of them.

Elizabeth Doughaday v. James Crowell et al., 11 N. J. Eq. 201.
Manning v. Lelland, 153 Mass. 510, 27 N. E. 519.
Bohart v. Oberne, 13 Pac. 389.

"A ratification may be implied from the acceptance of the benefits of the unauthorized act * * * but here, as in other cases it is indisputable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry, otherwise the receipt *and retention* of the benefits of the unauthorized act cannot be deemed a ratification of it."

Willison v. McKain, 39 N. E. 888.

"The respondent authorized an agent to negotiate for the sale of certain lands belonging to him, among which was a lot known as the Potter lot, and to sell the same on his consent. The agent agreed by parol to sell the lands, including the Potter lot, and the respondent received the money for the same and held the same, when, sometime after a demand was made upon him for a conveyance of the Potter lot, *and still retained the same.* The respondent, however, did not know at the time he received the money that the Potter lot was included by the agent in the sale, and on the trial denied that it was so included except upon certain conditions not complied with by the petitioner. Held that the agreement of the agent for the sale of the Potter lot was neither authorized nor ratified."

Lester v. Kinne, 37 Conn. 9.
Jackson and another v. Badger, 26 N. W. 908.
Combs v. Scott et al., 12 Allen 497.

"The ratification of a sale by an agent must be unequivocal and with full knowledge of all the facts in order to be effectual. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification."

Bosseau v. O'Brien, Fed. Cas. 1667.

There was no such actual or constructive notice of the contract with plaintiff as to bind defendants, Magoon, McStocker and Lamb, even though a part of plaintiff's money entered into the dividend received by them.

"The supposed principal must not only have full knowledge of all the material facts relating to the contract, but also of every fact requisite to enable him to repudiate it or the means of knowledge must be at hand."

Ladd v. Hildebrant, 27 Wis. 144.

The question of ratification we have contended under Defense VIII has in any event nothing to do with the case because the agreement is joint and recovery must be had against all the defendants or none, and in this case recovery can in no event be had against all.

DEFENSE XIII.

The Gilmore-Harrison agreement provided in section 4, that if at or before the expiration of a period of six months from the date of the departure of said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him. Harrison first started for Tasmania about Oct. 4, 1897, (Tr. 127). He was dissatisfied with the business upon reaching Sydney (Tr. 137), which must have been about Oct. 7. The New Zealand suit was filed April 18, 1898, (Tr. 173) 13 or 14 days after the expiration of the six months and

that is the first notification that any of the defendants had that Harrison was dissatisfied. He never told them that he was dissatisfied. (Tr. 141.) At this time the partners in the company in the A. P. and I. Company had scattered to the four corners (Tr. 110). The company was no longer doing business, and unquestionably service of process upon one would not bind the others. 15 Ency. Pl. & Pr. 900 and note, and 902-3-4.

So the notice of dissatisfaction came too late to affect any of the partners that might have been in Australia when the suit was filed; for if Harrison could give notice of his dissatisfaction one day after the expiration of the six months, there is no reason why he could not give such notice any time before the statute of limitation ran against the claim. There is no evidence, however, of when or upon whom the summons were served in Australia; but it must have been prior to June 13, 1899, the date of the recovery of the New Zealand judgment. This notice would, of course, not be binding in any way upon these defendants nor upon Ables, the proceedings with reference to whom were begun Thursday, June 9, 1898, (Tr. 171) when an order was made of services upon these defendants, L. C. Ables et al. This was two months and five days after the expiration of the six months. Service being made on them in Honolulu about July 23rd, 1898, (Tr. 147).

It was like a contract of sale or return where if the vendee does not elect to keep the property he must return it according to the terms of the contract.

An action will not lie on a contract payable in anything other than money until after a special demand made.

Parr v. Johnson et al., 35 N. W. 176.

Where the plaintiff's rights of action under the contract are in the alternative, he must notify the defendant of his election to create a cause of action.

Center v. Center, 38 N. H. 318.
Rewrick v. Goldstone, 48 Cal. 554.

A person who is induced to part with his property on a fraudulent contract may, on discovering the fraud, avoid the contract and claim a return of what he has advanced upon it. Fraud discharges the contract *ab initio* and the fraudulent purchaser has no title. But if the party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after discovery of the cheat. That is the time to make his election and it must be done promptly and unreservedly. He must not hesitate nor can he be allowed to deal with the subject matter of the contract and afterwards rescind it. The election is with him, he may affirm or disaffirm the contract, but he cannot do both; and if he concludes to abide by it, as upon the whole advantageous he shall not afterwards be permitted to question its validity.

The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle.

Mass v. Bovet, 1 Denio. 73-4.

The attention of the court is called to the fact that in this case Harrison never offered to return what he received under the agreement, that is the right to operate in Tasmania, nor did he ever offer to exchange that right for any other territory.

6 Am. & Eng. E. L. 471-473.

The longest time that Harrison could have had to accept the offer to pay him his £2000 was to have mailed it from Auckland, to which place he had returned at the end of the six months. 9 Cyc. 290. This he does not claim to have done.

DEFENSE XIV.

What Harrison gave for his interest under the Gilmore-Harrison agreement was a sheep run which was valued at £2000. He paid no cash. The sheep run was of no value to the company over and above what it would sell for. This Harrison knew. The most that he could under any circumstances expect was

that the company would make an arrangement with Ables so that Ables would take the sheep run. When Harrison became dissatisfied with his agreement he wanted to get his sheep run back again. This he might have done had there been any fraud or misrepresentation on the part of the company or any other reason for a recision of the Gilmore-Harrison agreement. Instead of taking prompt measures to get his sheep run back again, he loiters in Sydney, returning to Auckland November 1st (Tr. 130). He fears that the company will dispose of the sheep run (Tr. 132) and so he telegraphs, without knowledge of the company, over the country, to all the people he knew that has ever seen those sheep except Robison, that he claimed the sheep and not to buy them (Tr. 102). Robison was the very man to whom Ables sold the sheep run, after he had made diligent attempt to sell the same to other parties.

Harrison claims that the £500 for which the sheep run was sold was the price of the wool on their backs. (Tr. 133.) Is it any wonder that Ables could not get a higher price and is it any one's fault but Harrison's? It would be most inequitable to permit him at this time to say that the sheep were worth £2000 or £1900. Even after the sheep was sold to Robison for £500, there should have been, under all the circumstances, a way to have secured their return to Harrison. Robison had given his notes for the sheep run, and one note of £50 only had been paid in cash, leaving a balance due of £450. If Harrison had been diligent in the matter, he undoubtedly could have recovered the sheep upon the payment of £50, and these defendants could not in any event have been called upon to pay more than his actual losses, the £50 plus his expenses.

DEFENSE XV.

The agreement sued upon is not binding upon these defendants for the reason that their rights were complete under the first agreement, dated Sept. 16, 1897, (Ex. O, Tr. 78). This agreement has been incorrectly copied into the record. The 4th clause should read: "That if at the expiration of six months

from the date of departure of the said Gilmore or the said Harrison from New Zealand to Tasmania," either should be dissatisfied the company would give stock of the market value of £2250. The apparent cause of this error is that the agreement was changed in pencil for recopying (Tr. 98) and the pencil marks were never erased. Plaintiff, however, correctly states the agreement on page 4 of his brief.

Under this agreement Harrison was obliged to give a good title to the entire sheep run. 9 Cyc. 316.

Under the second and third agreements whereby Harrison secured material concession, namely the right to become dissatisfied within six months, the rights of these defendants were given up or forfeited without consideration. This could not be done even though the partnership agreement or powers of attorney authorized the making of the contracts of Sept. 16 and 20 or 23rd.

MISCELLANEOUS.

In case the court should hold that the non-suit was wrong as to Ables it would not disturb it as to the defendants Magoon, McStocker and Emerson, if it was right as to them.

A new trial may be granted as to one without disturbing the verdict as to the others.

Sims et al. v. State, 13 S. E. 551.
First Nat. Bk. v. Williams, 26 N. E. 75.
Albright v. McTighe, 49 Fed. 817.

Court may deny in part and grant in part.

Bennett et al. v. Closson, 38 N. E. 46.
W. A. Benton v. Ruffin V. Collins, 47 L. R. A. 33.

In *Penn. Railroad Co. v. Jones,* 155 U. S., on page 354 (39 L. C. P. Co. 183), plaintiff was allowed to elect to become nonsuit as against the Penn. Railroad Co. and take judgment on the verdict against the other defendants. See also *The Washington GGas Light Co. v. Thomas Lansden,* 172 U. S. 534 on page 557 (43 L. C. P. Co. 543).

Plaintiff claims that he should be allowed to amend his compaint in order to hold Ables.

Amendments rest in discretion and no reason is shown why the refusal of the court in disallowing the amendment amounted to an abuse of discretion. In fact to claim that Ables should be called upon to alone pay the guaranty, shocks the conscience. By the greatest stretch of imagination, it could not be contended that Ables ever intended to become individually liable to pay the £2000 or any part thereof.

The rule is that where one familiar with the powers of an agent deals with such agent in matters clearly beyond the power conferred upon the agent, the agent is not personally liable.

1 A. & E. Ency. L. 1127.

Therefore the authorities cited in plaintiff's brief on pages 44-5-6-7-8 do not apply. And this is perhaps a good illustration of the citations throughout plaintiff's brief. The rules of law stated in the citations may be entirely correct but it is submitted they are not in point.

The last contention of plaintiff in his brief as to the discretion of the court in granting a new trial seems to require no answer other than the discussion hereinabove contained.

It is respectfully submitted that the decision of the Supreme Court of the Territory of Hawaii should be affirmed and the writ dismissed with costs against the plaintiff.

Alfred Magoon

W. Lee Stroke

Dorothea Emerson

Dated Honolulu, December 18, 1906.